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TO: Patrick Reffett, Planning Director
CC: Michael Lombardo, Town Manager
FR: Lisa L. Mead, Special Town Counsel
DA: May 20, 2016
RE: Town of Hamilton Comprehensive Permit Policy & Development Guidelines ("Policy")

Reference is made to the above captioned matter. In that connection, I was requested to review the Policy and advise the Town as to the legal effect of the Policy as it relates to projects proposed under G.L. c. 40B §§ 20-23 (the "Comprehensive Permit Law"). Additionally, I have been asked to provide the responsibility of the Town with respect to a proposed Comprehensive Permit project.

I Town of Hamilton Comprehensive Permit Policy & Development Guidelines

I have reviewed the Policy which was adopted by the Planning Board in 2004. This of course was the height of the last housing boom in Massachusetts, prior to the downturn in late 2007-2008. The Policy provides guidance to a prospective developer before filing for a Comprehensive Permit. However, as you will see below, the Policy has no real force of law nor should it be considered by the Town as a "requirement" that each potential developer must follow. Indeed, as you see, the Planning Board is merely advisory in the case of a Comprehensive Permit application. The Chapter 40B regulations, at 760 CMR 56.00, *et seq.*, (the "Regulations") were also promulgated by the Department of Housing and Community Development ("DHCD") in 2008, subsequent to establishment of the Policy, recodifying, amending and superseding DHCD's predecessor regulations. To the extent the Policy is at all inconsistent with the Regulations, the latter control.

Having said that, however, if an applicant files for a Local Initiative Program ("LIP") project, that is a project which is done cooperatively with the Local Housing Partnership ("LHP") and Board of Selectmen ("BOS"), then the LHP and the BOS can require, in exchange for their cooperation, that a potential applicant follow the process outlined in the Policy (insofar as it is consistent with the Regulations). A LIP project does not, however, involve the review of MassHousing for a Project Eligibility Letter, rather a LIP includes an application filed by the BOS and the Applicant to DHCD which, in turn, approves, or not, the application. As a result, if in fact the goal of the Planning Board is to have an applicant comply, to the extent legal, with the Policy, then it would be beneficial for the Town to encourage applicants to work with the Town and file LIP applications.

Assuming an applicant is voluntarily following the Policy, which of course it is not required to do, I would like to point out the following issues with respect to specific provisions of the Policy.

Section 2 requires that a local preference be a condition of a permit. However, such a condition is now not appropriate as a requirement, rather any Comprehensive Permit would have to include language which provides "to the extent allowed by the Department of Housing and Community Development and permitted by the Massachusetts and Federal Fair Housing Laws." You should also be aware that, if the Town wishes to implement a local selection preference, DHCD's Comprehensive Permit Guidelines (the "Guidelines"), adopted shortly after the Regulations and presently revised through December 2014, require it to (a) demonstrate the need for the local preference, (b) justify the extent of the local preference and (c) demonstrate that the local preference will not have a disparate impact on protected classes.

Section 3 Master Plan:

Housing Goals: This provision is helpful, though it cannot be directive, as it shows that the Town is using its Master Plan as a template. Further, I am informed that the Town has an approved Housing Production Plan, which will also be applicable in providing guidance to a potential developer about where and what type of housing the Town is looking for. Again, these types of provisions are merely advisory.

Open Space: The requirement that 40% of the site "should be preserved as permanent open space..." again can only be merely advisory.

While I have not reviewed the zoning bylaw as compared to this provision, certainly the Town could not impose a stricter provision with regard to open space than is in the zoning bylaw and in addition, the Applicant can seek a waiver from any zoning provision if the application of same makes the project uneconomical.

The remainder of this section, again may only be used as advisory, and can inform any comments the Planning Board may have on a Comprehensive Permit Application or the Town may determine that any LIP applicant must adhere to the Policy if it wants the LHP or BOS to adopt same. However, of course, given that this is a Planning Board Policy, there is no requirement that the LHP or the BOS follow same.

II Overview of the Comprehensive Permit Law

A. General Background and Zoning Board of Appeals Power:

In an effort to merely provide an introduction to the Comprehensive Permit law and process, I am setting forth below a brief overview. This is not meant to include every nuance or tool available for a Zoning Board of Appeals ("ZBA") or Town to employ when reviewing, commenting upon or even dealing with a filed Comprehensive Permit application. Rather, it is meant to provide a base line of information in order to prepare the Town for the process.

The Comprehensive Permit legislation was passed in 1969 to address what was described as a "woeful shortage of affordable housing". The legislature's intent was to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing. Thus the result was the creation of G.L. c. 40B §§20-23 whereby the statute permits the issuance of a single, or comprehensive permit, where certain preconditions are met. The sole authority to issue that permit lies with the ZBA.

Essentially what was created was "One Stop" shopping. A Comprehensive Permit covers all local permits and the various boards and commissions charged with the issuance of those permit. The only exception to the ZBA issuing the only permit is as follows:

- The Conservation Commission's application of the Wetlands Protection Act, (the application of any local wetlands bylaws and/or regulations are under the purview of the ZBA)
- The Building Inspector and the application of the State Building Code, and
- The Board of Health's application of Title V, if applicable.

There are times when one of these various boards will believe that its local regulations are a natural extension of state law, however they are not. The Supreme Judicial Court in Dennis Housing Corp. v. Zoning Board of Appeals of Dennis, 439 Mass. 71 at 78 (2003) very clearly notes that local historic commissions are local boards for the purposes of G.L. c. 40B and it further determined that the list in the statute is not intended to be a precise list, but rather a list of local agencies and officials performing comparable functions to the listed forms of "local board". The HAC has included Conservation Commissions in that list as well, in the case of Archstone Communities Trust v. Woburn Board of Appeals, No. 01-07, slip op at 36 (Mass. Housing Appeals Committee, July 11, 2003). See also Planning Office for Urban Affairs, Inc. v. Lexington, No. 73-03, slip op at 7-8 (Mass. Housing Appeals Committee Aug. 29, 1974) aff'd No. 74-1721 (Middlesex Super. Ct. Feb. 27, 1975) (rejecting the town's position, which it states as arguing that "these agencies" are not 'local boards'", and instead concluding that the developer will "meet the requirements of both organizations").

The statute does require the ZBA to notify each local board when a Comprehensive Permit application is filed and further provides that the ZBA shall request the appearance of representatives of local boards that the ZBA deems necessary. Further it provides that the ZBA shall have the same power as the local boards to issue permits or approvals. G.L. c. 40B §21. The ZBA may take into consideration the recommendations of the local boards. However, the mere request of an appearance or for recommendations does not abdicate to the local board the ZBA responsibility over the issuance of the permit and/or any waivers or compliance with the local laws.

B. Process:

The applicant must present the project to the ZBA and the applicant has the burden of proof to demonstrate that the project is **substantially sound and legally defensible**. (Unlike in a typical ZBA decision where the

scope of review on appeal is whether the ZBA decision was "fairly debatable", i.e. that the ZBA did not act in an arbitrary and capricious manner.) On review the Housing Appeal Committee ("HAC") looks to see if the project is substantially sound and legally defensible, if the ZBA denies a project. The 40B standard is a much greater burden for the ZBA to overcome.

1. Brief Overview:

The Town's ZBA should have in place rules and regulations for Comprehensive Permit applications. These rules and regulations would cover what is required to be included in filing, filing fee, number of applications, choosing of consultants and the like. If the Town does not have them, then the ZBA must conduct business pursuant to 760 CMR 56.05, i.e. the section of the Regulations governing "Local Hearings." The key provisions of said section are as follows:

a. The ZBA must open the hearing within 30 days of receiving a complete application (except where by agreement it is extended), and must thereafter pursue the hearing "diligently." The ZBA must notify all local boards and officials in the Town of the application within seven (7) days of its receipt, by sending them a notice of the application and a copy of the list of waivers (if any) required to be a part thereof. The ZBA should solicit comments from these boards and officials as well, and then, when appropriate, request their appearance at the public hearing to discuss issues relative to matters typically within their jurisdiction.

b. At the first hearing, the Applicant will present its case to the ZBA. Prior to the initial hearing however we recommend the Town and the applicant come to terms on the consultants. [As an aside, G.L. c. 40B, through G.L. c. 44 sec. 53G, allows a town to require the applicant to pay into escrow, and amount of money sufficient to pay the Town's own consultants to review the project. This could include engineering, financial; traffic, and wetlands. Some Applicants will

also agree, though they cannot be required, to pay for the ZBA's legal counsel as well. (The exception is "where an attorney's specialized legal expertise is needed to review technical aspects of a proposal, such as title questions"; in such an instance, the ZBA may assess the legal fee as a consultant's fee under § 56.05(5). See Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC, 464 Mass. 166, 190 (2013)). To utilize G.L. c. 44, sec. 53G, the ZBA must promulgate rules for the imposition of reasonable fees to employ outside consultants as aforesaid.

c. The ZBA will have its experts and consultants review the Applicant's information and determine if more information is needed in order to render its decision.

d. In cases such as where the Wetlands Protection Act is affected as well as local wetlands by-laws, the ZBA may ask the local Conservation Commission to comment on the effect of waiving provision(s) of the local by law, and how that local by-law offer protection beyond that of the State Wetlands Protection Act. The ZBA could also ask the Conservation Commission to address the question of what the consequences are if there is a failure to apply the local by-laws, i.e. if such failure would result in significant adverse impacts which outweigh the presumptive need for regional housing.

e. Once the parties have placed all pertinent information on the record and the ZBA has determined that its questions have been answered, then the ZBA can close the public hearing. Per the Regulations, absent written consent of the Applicant to further extend, "a hearing shall not extend beyond 180 days from the date of opening the hearing, presuming that the Applicant has made timely submissions of materials in response to reasonable requests of the Board. . ." See 760 CMR 56.05(3).

f. Once the public hearing is closed, the ZBA has 40 days to render its decision. The ZBA has the authority to override any local land-use or other requirement, if after balancing the regional need for affordable housing against local environmental and planning concerns, the proposal is consistent with local needs. The ZBA may apply local regulations so long as their application does not make the project uneconomic. A project is rendered uneconomic if (a) where the Applicant is a public agency or nonprofit organization, it would be impossible for such entity to proceed in building or operating the project without financial loss or (b) where the Applicant is a limited dividend organization, it would be impossible for such entity to proceed and still realize a reasonable return in building or operating the project.

g. The decision is made on a simple majority vote.

C. Jurisdictional Pre-requisites:

The Applicant must first show that it has met all of the following jurisdictional pre-requisites, the failure of any of which could allow the ZBA to dismiss the application:

1. The applicant must be a public agency, non-profit organization, or a limited dividend organization.
2. The project shall be fundable by a subsidizing agency under a low or moderate income housing subsidy program.
3. The applicant has control of the site.

Compliance with the above requirements is established by issuance of a written determination of project eligibility by the subsidizing agency; which determination shall be conclusive on the ZBA. (Provided, however, that the ZBA may at any time allege a failure of the Applicant to continue to fulfill these requirements, and a determination shall be made thereon by the subsidizing agency.)

D. Decisions by the ZBA:

The ZBA should examine the application, and may do so by use of its own experts conducting peer reviews of the Applicant's submission, and determine whether it can be built without significant adverse effects and is consistent with local needs, even though the Application may not be in compliance with local regulations.

The ZBA may (a) approve a project, (b) approve a project with conditions or (c) deny a project. In the case of denial subsequently challenged on appeal, the question will be: Is the ZBA's decision reasonable and consistent with local needs, and do these local needs outweigh the need for regional housing?

In the case of approval with conditions and requirements, the standard on review is whether such conditions and requirements, considered in the aggregate, make the construction or operation of the housing uneconomic and, if so, whether the conditions are consistent with local needs.

A project is consistent with local needs when:

a. The statutory minima have been met.

There is a basic presumption that the need for low- to moderate-income housing outweighs local concerns. The state has established standards to determine if there is a need for such housing: Any decision denying a project will be deemed "consistent with local needs" if:

i. Low or moderate income housing exists that is in excess of 10 percent of the housing units reported in the latest decennial census of the Town; or
ii. Low and moderate income housing exists on sites comprising one and one-half percent or more of the total land areas zoned for residential, commercial or industrial use; or
iii. The application would result in construction of such housing on sites comprising more than three-tenths of one percent of the municipality's land area (or 10 acres which ever is larger) in any one calendar year; or
iv. If the municipality has adopted a housing production plan *approved by DHCD* pursuant to which there is an increase in its number of low

or moderate income housing units (which are eligible to be included on the subsidized housing inventory) by at least one-half of 1% of total units every calendar year until that percentage exceeds 10 percent of total units.

OR

b. If the municipality cannot demonstrate satisfaction of the above, then its decision to deny, or approve with conditions, may be consistent with local needs if:

i. When the regional need for low and moderate income housing considered with the number of low and moderate income persons in the city or town affected with the need:

a. to protect the health and safety of the occupants of the proposed housing or of the residents of the city or town;

b. to promote better site and building design in relation to the surroundings, or

c. to preserve open spaces; AND

d. if such requirements and regulations are <u>applied equally to both subsidized and unsubsidized housing.</u>

ii. In order for the local need to be considered more important that the regional housing need the ZBA must show that:

a. the environment is endangered by the project;
b. public health and safety is imperiled; OR
c. critically needed Open Space is being removed.

Only in rare cases has the Housing Appeals Committee upheld local planning concerns as outweighing the regional need for housing.[1]

[1] In the case of Barnstable, <u>Stubron Ltd partnership v. Barnstable Board of Appeals,</u> in 2002, where that very question was the issue, where the Board needed to show that its planning concerns outweighed the need for low and moderate income housing. In this case there was a proposal to build 32 units of condominiums on Freezer Road, on a peninsula in Barnstable Harbor. The site had historically been used in relationship to old waterside uses such as ice storage, for commercial fishing boats and boat storage more recently. The Town argued that the proposal conflicted with the Town's local Comprehensive Plan which called for primarily marine use in this area. The developer needed to prove that the project complied generally with state and federal requirements and other generally recognized design standards. Here, in the absence of state or federal requirements addressing the sort of planning concerns at issue, the question became whether the proposal conformed to generally recognized standards. If the developer proved the proposal did conform, then the Town was to show that its planning concerns outweighed the need for

Often times we are asked: "Can the ZBA deny a project because the Town infrastructure cannot support it?" The short answer is no. The HAC has determined that since the Comprehensive Permit Law was enacted without a provision authorizing the requiring of off-site improvements, then the difficulties in providing municipal services should not stand in the way of the development of affordable housing. Specifically, "the denial of a comprehensive permit may be upheld based upon the inadequacy of municipal services or infrastructure, only if the ZBA proves that the installation of adequate services is not technically feasible or is not financially feasible due to unusual geographical or environmental circumstances. Hilltop Preserve Ltd. v. Walpole Board of Appeals (HAC 2002) (300-unit apartment complex on 42 acres 1, 2 and 3 bedroom homes.); see also 760 CMR 56.07(2)(b)(4).

In the case of a denial, the Applicant may establish that the project is sound with respect to aspects that are in dispute, by proving that the project complies with state or federal statutes or regulations, or that it complies with generally recognized standards as to matters of health, safety, design, open space or other local concerns. In the case of denial, on appeal to the HAC, the ZBA may not present evidence of economics of the project.

The ZBA may impose conditions as part of any approval that do not make the project uneconomic. If challenged, the Applicant has the burden of proving that the conditions make the project uneconomic.

If there are legitimate local regulations which the ZBA wants to impose or mitigation which would make the project safer or environmentally

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regional low and moderate income housing. In this instance the HAC determined that if a Town had a Comprehensive Plan which was a (1) bona fide plan, that is was it legitimately adopted, (2) that promoted affordable housing and (3) had been implemented in the area of the site, then the HAC would give it weight and go on to consider if the provisions of the plan were unnecessarily restrictive as applied specifically to the proposed project and whether the proposed housing undermined the plan to a significant degree. Since the Town had properly adopted and applied the plan, affordable housing was being addressed elsewhere and there was evidence that the Town had worked on the creation of affordable housing, and further where the plan was basically applied to the area in question and where the area in question was a disappearing resource, the Town's plan was considered a legitimate local planning concern and its proper application outweighed the need for regional low and moderate income housing. Be aware, however, that there are cases where there did exist a legitimate Comprehensive Plan, but the Town did not apply it as it had been passed, many variances on the original plan had been granted and, consequently, the Town could not then use that plan to try to stop an affordable housing development.

friendly, those conditions can be imposed. Often times these items are worked out with the developer and then taken into consideration when the ZBA's consultants review the project.

The HAC has determined that it will not disturb local conditions that do not render the project uneconomic, regardless of the consistency of such conditions with local needs.

As you can see there are very strict requirements with regard to the application process, the hearing process, what the ZBA can and cannot require or impose should it chose to approve a project with conditions and when the ZBA can deny a project altogether. These matters should be seriously considered when reviewing and acting upon a Comprehensive Permit application.